18

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

In re MARTHA ESPINOZA, Debtor.	Case No. 05-10024-A-13F
MARTHA ESPINOZA, Plaintiff, vs. BOB PERALES and RICK PERALES, collectively dba PAC AUTO MALL, Defendants.	Adv. No. 05-1291 Date: January 6, 2006 Time: 11:00 a.m.

MEMORANDUM DECISION

This adversary proceeding is an action under 11 U.S.C. § 362(h). It seeks damages for an alleged violation of the automatic stay. This action is within the subject matter jurisdiction of the court and it is a core proceeding. See 28

U.S.C. §§ 1334(b) & 157(b)(2).

Martha Espinoza purchased a 1998 Plymouth Breeze automobile from PAC Auto Mall, Inc., ("PAC") on or about October 29, 2004. At the time of the purchase, Ms. Espinoza was a chapter 13 debtor in Case No. 04-13013.[1] Because of that pending bankruptcy, finding a lender for the transaction was difficult. Ultimately, on November 9, 2004, Lobel Financial agreed to lend the money for the purchase, but with full recourse against PAC.

Ms. Espinoza made the first monthly loan installment in November 2004. However, she lost her job in November and was unable to make the December installment.

Ms. Espinoza filed a second chapter 13 petition on January 3, 2005. She listed both PAC and Lobel Financial on Schedule D as holding claims of $429 and $4,137.70, respectively.[2] Both claims were identified as being secured by a 1998 Plymouth Breeze with a value of $3,500.

///

---

[1] Case No. 04-13013 was filed on April 8, 2004 and dismissed on the chapter 13 trustee's motion on November 12, 2004. The trustee brought the dismissal motion because, less than two months after the confirmation of a plan, the debtor's chapter 13 plan payments were in default. The debtor's testimony that she voluntarily dismissed this earlier petition is incorrect.

Ms. Espinoza was also a debtor in an earlier chapter 13 petition, Case No. 03-15246, filed on June 4, 2003. It was dismissed on February 26, 2004 at the request of the chapter 13 trustee because the debtor had failed to maintain plan payments. This earlier case pre-dates the relevant events in this matter.

[2] Apparently, the $429 is the remainder of the $1,000 down payment owed by the debtor to PAC. Lobel Financial, according to its proof of claim, financed only $3,500.94 and was owed $3,518.77 on January 3.

The chapter 13 plan initially proposed by the debtor provided for payment in full of this claim. That plan again identified PAC and Lobel Financial as holding secured claims of $429 and $4,137.70, respectively. However, rather than list the auto as having a value of $3,500, the plan valued it at $4,500.

On January 27, 2005, the trustee served the proposed plan together with the "Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines" ("the Notice"). By this notice, creditors were advised that Ms. Espinoza had filed a chapter 13 petition on January 3, the meeting of creditors would be on February 22, and proofs of claim had to be filed by May 23, 2005.

On January 29 or 31, Rick Perales, an employee at PAC and brother of PAC's sole shareholder, Bob Perales, ordered and obtained the repossession of the car between the hours of 8:00 a.m. and 10:00 a.m. Whether the repossession occurred on January 29 or 31 is a matter of dispute, a dispute that the court regards as irrelevant.

Whether the repossession was on January 29 or 31, it came after the petition was filed and while the automatic stay of 11 U.S.C. § 362(a) was in place. The repossession was in violation of section 362(a)(3).

The court finds, however, that the repossession was accomplished before the Notice was received and read by Mr. Perales.[3] The Notice was served on Thursday, January 27th and the repossession occurred either on Saturday, January 29th, or Monday, January 31st. Given that a business is unlikely to

---

[3] The reference to "Mr. Perales" is to Rick Perales.

receive mail over a weekend, given the proximity of the repossession to the mailing of the Notice, and given the early morning repossession, it is unlikely Mr. Perales received the Notice prior to the repossession.

The assertion, however, by Mr. Perales that he did not learn of the bankruptcy until the summer of 2005 is untrue. The court so finds for several reasons. First, the trustee mailed the Notice to the correct address for PAC. Second, Mr. Perales acknowledged that had the Notice been received, it would be directed to him. Third, the notice was also addressed to Lobel Financial. It obviously received it because it filed a proof of claim on February 7, 11 days after the Notice was mailed.[4] Fourth, Mr. Perales telephoned Ms. Espinoza's home immediately after the repossession and spoke to her sister, Josephine Espinoza-Villa. Ms. Villa testified that she told Mr. Perales that Ms. Espinoza had filed a chapter 13 petition during their conversation.[5]

There is another reason for the finding that Mr. Perales received notice of the bankruptcy petition shortly after the repossession of the vehicle. On January 31, Ms. Espinoza's former attorney sent a demand letter by facsimile transmission to

---

[4] The court takes judicial notice of this proof of claim and the date of its filing.

[5] While Mr. Perales denied having any such telephone conversation with Ms. Villa after the repossession, the court finds that the telephone call took place. Mr. Perales testified that had Ms. Espinoza paid for the vehicle, it would have been returned. PAC just wanted its money. It seems probable, if PAC just wanted its money, that a telephone call would be placed to inform the customer of the repossession and the conditions under which PAC would return the vehicle.

PAC demanding the return of the vehicle. While Mr. Perales denies receipt of the letter, the letter was transmitted to PAC's telephone number for facsimile transmissions and the attorney's facsimile machine produced a receipt showing that the transmission was successful.[6]

It is unlikely that both the Notice and the facsimile transmission were not received by PAC and Mr. Perales. The court finds that both were received. Thus, Mr. Perales and PAC learned of the filing of the petition immediately after the repossession and probably learned of it the very day the repossession occurred.

Over the next several months, both sides did nothing. Mr. Perales and PAC did nothing to restore the vehicle to Ms. Espinoza. And, Ms. Espinoza's former attorney did nothing to recover possession.

Mr. Perales argues that his inaction is evidence that he was unaware of the petition. That argument, however, is not plausible. If Mr. Perales and PAC had been unaware of a bankruptcy petition, he and PAC would have immediately reconditioned the vehicle and sold it. This is confirmed by the Notice of Intention to Dispose of Motor Vehicle dated January 31, Exhibit 8. It indicates that PAC would sell the vehicle after

---

[6] The receipt shows that transmission occurred at 12:03 a.m. on February 1. Adele Eleazarian testified, however, that the time calibration of the facsimile transmission machine was slightly "off," and she further testified that she had an independent recollection of sending the facsimile on January 31. Ultimately, it makes no difference whether the transmission occurred on January 31 or in the early morning hours of February 1. The fact remains that it was sent, and it was received after the repossession but before PAC resold the vehicle.

"February 31, 2005" [sic]. That is, a sale could occur as soon as 30 days after the repossession.

Instead, shortly after PAC and Mr. Perales gave the Notice of Intention, they learned of the petition. They did not sell the vehicle within 30 days after the repossession. It was retained until June 6, 2005.

It appears to the court that notice of the petition prompted Mr. Perales and PAC to not sell the vehicle. They held possession and took a "wait and see" approach. Only after five months passed and when Ms. Espinoza's former attorney did nothing to recover possession, Mr. Perales concluded it was safe to dispose of the vehicle.

It was not incumbent on Ms. Espinoza or her former attorney to stir Mr. Perales or PAC to action. Having repossessed the vehicle in violation of the automatic stay, Mr. Perales had an obligation to restore the status quo. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1213-15 (9th Cir. 2002). That is, upon discovering that Ms. Espinoza's petition predated the repossession, he was required to put Ms. Espinoza back in possession of her Plymouth. This was not done.

Once a creditor becomes aware of the filing of the bankruptcy petition triggering the automatic stay, any intentional act that violates the automatic stay is willful. See Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227 (9th Cir. 1989) ("'A 'willful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay

were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded.' INSLAW, Inc. v. United States (In re INSLAW, Inc.), 83 B.R. 89, 165 (Bankr. D.D.C. 1988).") Once a creditor knows that the automatic stay exists, the creditor bears the risk of all intentional acts that violate the automatic stay regardless of whether the creditor means to violate the automatic stay. Id. at 317-18.

Therefore, the court concludes that Mr. Perales willfully violated the automatic stay and he is liable for all actual damages, including punitive damages, costs, and attorney's fees, caused by his violation of the automatic stay. See 11 U.S.C. § 362(h).

Ms. Espinoza has not claimed the value of the Plymouth because she admits that it had no value in excess of the secured debt. The court therefore will award nothing for the loss of the Plymouth.

Damages for loss of use of the Plymouth are claimed for the period from February 1 through December 22, 2005, but there are several problems with this claim.

First, Ms. Espinoza offered no evidence regarding the rental value of the Plymouth.

Second, the evidence of Ms. Espinoza's out-of-pocket expenses to obtain temporary replacement transportation is sparse. Her sister, Josephine Espinoza-Villa, resides with Ms. Espinoza. Ms. Villa testified that she permitted Ms. Espinoza to use her car or Ms. Villa chauffeured her sister to work and on other occasions. Ms. Espinoza's parents did likewise. However,

there is no evidence, or no convincing evidence, from Ms. Villa or the parents as to the frequency that this occurred or the additional costs they incurred when assisting Ms. Espinoza.[7]

There was mention of an agreement to pay Ms. Villa and the parents $20 a day (when Ms. Espinoza was employed) or $10 per trip (when she was unemployed), but there was no evidence of other specifics such as the number of trips nor how these amounts were calculated. Without this evidence, the court has no factual basis for finding that these amounts represent fair compensation for Ms. Espinoza's use of Ms. Villa's and her parents' vehicles.

Third, in June 2005, after the Plymouth was sold and after Ms. Espinoza's new counsel began to pursue the matter, the defendants offered to provide Ms. Espinoza with a comparable replacement vehicle at the same cost.[8] This offer was declined.

Because PAC is in the business of selling used cars, and given that Ms. Espinoza came forward with no evidence that the offer was not a serious or a fair one, it seems likely the defendants could have replaced the Plymouth and thereby restored the status quo. Their offer to do so is sufficient to cut-off

---

[7] To the extent Josephine Espinoza-Villa expected to be compensated for transporting her sister, the court notes that she did not identify this expectancy as an asset in her chapter 7 petition, Case No. 05-15734, filed on July 21, 2005.

[8] The court would not typically consider a settlement offer relevant to the resolution of a dispute. See Fed. R. Evid. 408. However, in the context of a violation of the automatic stay, the offending party is required to restore the status quo. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1213-15 (9th Cir. 2002). Here, the attempt was made, eventually. It is therefore appropriate to consider the offer in order to determine what damages the plaintiff has sustained and/or how much of those damages the defendants must pay.

their liability for loss of use damages.

Unfortunately for Ms. Espinoza, the only credible evidence of damages occasioned by the loss of use of the Plymouth pertains to the period after the defendants offered to replace it. That proof consists of rental charges totaling $345.03 from Hertz and Enterprise.

The court awards nothing for the loss of use of the Plymouth.

Ms. Espinoza also maintains that she suffered emotional distress and upset because of the repossession of her car. She demands damages for this injury.

In In re Dawson, 390 F.3d 1139 (9th Cir. 2004), the court held that damages for emotional distress are recoverable under section 362(h). The court held:

> [W]e must determine whether Congress intended the term "actual damages" in § 362(h) to include damages for emotional distress. We begin with the text of the statute, but it does not provide a definition for "actual damages." There is a contextual clue, however, that lends support to Plaintiffs' theoretical position.
>
> Congress chose the term "individual" to describe those who are eligible to claim actual damages under § 362(h). The statute allows any "individual," including a creditor, to recover damages. So, for example, if a willful violation of the automatic stay damages some portion of the bankruptcy estate, both the debtor and an individual creditor of the now less-valuable estate may recover actual damages. [Citations omitted.] But corporations, whether debtors or creditors, are not "individuals" for the purposes of this statute. [Citations omitted.] By limiting the availability of actual damages under § 362(h) to individuals, Congress signaled its special interest in redressing harms that are unique to human beings. One such harm is emotional distress, which can be suffered by individuals but not by organizations.
>
> . . .
>
> Reading the legislative history as a whole, we are

> convinced that Congress was concerned not only with financial loss, but also - at least in part - with the emotional and psychological toll that a violation of a stay can exact from an . . . individual. Because Congress meant for the automatic stay to protect more than financial interests, it makes sense to conclude that harm done to those non-financial interests by a violation are cognizable as "actual damages." We conclude, then, that the "actual damages" that may be recovered by an individual who is injured by a willful violation of the automatic stay, [footnote omitted] 11 U.S.C. § 362(h), include damages for emotional distress.

In re Dawson, 390 F.3d at 1146, 1148.

Ms. Espinoza testified: "After my car was taken away I started to feel very sad because I was going through personal stuff and didn't want to deal with more stuff." She reported that she asked her former attorney to recover her car quickly because she was "going into a bad depression." Ms. Espinoza also maintained that the emotional distress prevented her from concentrating at work. She was moody, slept excessively, cried, and entertained suicidal thoughts. Ms. Espinoza also testified that her depression caused her to seek medical help on two occasions. One doctor prescribed medication for depression and anxiety.

In order to recover damages for emotional distress, the court in Dawson explained an individual's burden of proof as follows:

> Although pecuniary loss is not required in order to claim emotional distress damages, not every willful violation merits compensation for emotional distress. . .[W]e are concerned with limiting frivolous claims. To that end, we hold that, to be entitled to damages for emotional distress under § 362(h), an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in

the bankruptcy process).

In re Dawson, 390 F.3d at 1149.

If Ms. Espinoza's testimony is credible and sufficient, the requirement of significant emotional harm is satisfied. The issue here is whether she has "clearly established" this significant harm. The court in Dawson explained how this burden might be satisfied:

> An individual may establish emotional distress damages clearly in several different ways.
>
> • Corroborating medical evidence may be offered. See, e.g., In re Briggs, 143 B.R. 438, 463 (Bankr. E.D. Mich. 1992) (requiring specific and definite evidence to establish an emotional distress claim arising from violation of the automatic stay); Stinson, 295 B.R. [109] at 120 n. 8 [9th Cir. B.A.P. 2003] ("The majority of the courts have denied damages for emotional distress where there is no medical or other hard evidence to show something more than a fleeting or inconsequential injury." (internal quotation marks omitted)); Diviney v. NationsBank of Tex. (In re Diviney), 211 B.R. 951, 967 (Bankr. N.D. Okla. 1997)...
>
> • Non-experts, such as family members, friends, or coworkers, may testify to manifestations of mental anguish and clearly establish that significant emotional harm occurred. See, e.g., Varela v. Ocasio (In re Ocasio), 272 B.R. 815, 821-22 (1st Cir. BAP 2002) (per curiam) (holding that testimony from the debtor's wife - that he suffered from headaches, did not feel well for a week, and went to the doctor to have his nerves checked - was sufficient to support emotional distress damages of $1,000 without medical testimony).
>
> • In some cases significant emotional distress may be readily apparent even without corroborative evidence. For instance, the violator may have engaged in egregious conduct. See, e.g., Wagner v. Ivory (In re Wagner), 74 B.R. 898, 905 (Bankr. E.D. Pa. 1987) (awarding emotional distress damages, based on the debtor's testimony, when a creditor entered the debtor's home at night, doused the lights, and pretended to hold a gun to the debtor's head). Or, even if the violation of the automatic stay was not egregious, the circumstances may make it obvious that a reasonable person would suffer significant emotional harm. See, e.g., United States v. Flynn (In re Flynn),

185 B.R. 89, 93 (S.D. Ga. 1995) (affirming $5,000 award of emotional distress damages, with no mention of corroborating testimony, because "it is clear that appellee suffered emotional harm" when she was forced to cancel her son's birthday party because her checking account had been frozen, even though the stay violation was brief and not egregious).

The court received no corroborating testimony or other evidence from the medical or psychological professionals treating Ms. Espinoza or from any of Ms. Espinoza's friends or relatives. Two relatives, a sister and a cousin who reside with Ms. Espinoza testified but made no mention of her depression or emotional distress. Nor did the court receive evidence, such as copies of medical bills, confirming the treatment received by Ms. Espinoza.

The court does not regard Mr. Perales conduct to be "egregious." While he repossessed the vehicle, it was done without prior notice that a bankruptcy petition had been filed. Although he learned of the petition immediately following the repossession and he failed to return the vehicle, he did not immediately dispose of the vehicle. It appears from the evidence that over the next five months, Ms. Espinoza'a former attorney, other than send an initial demand letter, did nothing to press for the return of the car. When nothing was done for approximately five months, the car was sold. After Ms. Espinoza's new counsel made it clear that Ms. Espinoza wanted the violation of the automatic stay redressed, Mr. Perales and PAC offered to replace the car and pay $750 in attorney's fees. His conduct was not egregious.

Nonetheless, the court agrees that a reasonable person could experience significant emotional harm in the face of a protracted violation of the automatic stay, a violation that deprived that

person of mobility and made her dependent of the kindness of others for her transportation needs.

The court will award $1,000 for emotional distress.

Ms. Espinoza also claims to have lost wages because the loss of her car prevented her from getting to work. The court, however, finds and concludes that she has failed to prove any such loss. There is no evidence that she was unable to report to work on particular days, no evidence of her rate of pay, and no evidence that an absence of work was attributable to her lack of transportation or some other reason. Her proof suggested to the court that she was able to go to work because of the assistance offered by her extended family.

The court will award no damages for lost wages.

Ms. Espinoza seeks to recover the value of personal property that was in her car when it was repossessed and that was not returned to her. The Notice of Seizure, Exhibit A, admits that a blue jacket, shoes, and "misc papers" were in the car. There is no evidence that these items were returned to Ms. Espinoza or otherwise disposed of by the defendants or PAC. Mr. Perales testified only that he was not contacted for the return of the items. In the circumstances presented here, it was incumbent on him to return the items to Ms. Espinoza. He did not, and did not attempt to do so, and he has not accounted for these items.

According to Ms. Espinoza, the following items, with the values indicated below, were in the car when it was repossessed:

three-quarter length jacket in new condition	$150
leather jacket in new condition	$150
hand cream	$ 10
windbreaker	$ 12
Nike shoes	$100

hiking boots	$250
Cash belonging to cousin	$175
TOTAL	$847

There are two problems with this demand. Insofar as the cash is concerned, the court will not reimburse Ms. Espinoza because she admits the cash did not belong to her. If her cousin, Victoria Valdovinos, was damaged by the violation of the automatic stay, it was incumbent on her to pursue her own claim. A recovery under section 362(h) is not limited to the debtor. However, because Ms. Valdovinos testified and never asserted that her money was in the car when it was repossessed, the court concludes that it was not in the car.

The second problem concerns the value of the clothing and shoes. The debtor filed Schedule B, her list of personal property, on January 19, ten or twelve days prior to the repossession. In Schedule B, she stated under penalty of perjury that all of her wearing apparel had a value of $200. Therefore, the court concludes that all of the shoes and clothing mentioned above had a value of $200.

Aside from the cash, to the extent there is a discrepancy between what Mr. Perales and Ms. Espinoza believe was in the car, the court finds that Ms. Espinoza's list is the more accurate.

The court will award $210 for the lost personal property.

Section 362(h) specifically directs the court to grant punitive damages "in appropriate circumstances." The appropriate circumstances entail more than a showing that there has been a willful violation of the automatic stay. Punitive damages may not be awarded absent some showing of reckless or callous disregard for the law or rights of others. See Protectus Alpha

Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985). Further, punitive damages cannot be awarded pursuant to section 362(h) absent appreciable, actual damages. See McHenry v. Key Bank (In re McHenry), 179 B.R. 165, 168 (B.A.P. 9th Cir. 1995).

As just noted in the discussion of the emotional distress damages sought by Ms. Espinoza, the court concluded that Mr. Perales' conduct relative to the repossession of the vehicle was not egregious. It again so concludes in this context.

Finally, Ms. Espinoza is entitled to the recovery of reasonable attorney's fees and costs under section 362(h). Her counsel shall file a motion for fees and costs within 10 days of the filing of this Memorandum Decision. It shall be set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Counsel is cautioned that when awarding fees, it will consider the result obtained. If this caution prompts the parties to resolve the issue, the court will approve a stipulated amount for fees and costs.

The remaining issue is which of the defendants is liable for the foregoing damages.

The evidence received by the court implicates only Mr. Perales. There is no evidence that Bob Perales, the sole shareholder of PAC, was involved in this affair, either directly or in a supervisory capacity.

///

///

///

///

Ms. Espinoza's case against Bob Perales hinges on the argument that because PAC's corporate powers had been suspended,[9] it is as if the PAC was a partnership. As an owner of the corporation, Bob Perales was therefore a partner and was personally liable for the debts of PAC.

This argument has no support in California law.

If a California corporation fails to pay corporate franchise taxes, its corporate powers are suspended. See Cal. Rev. & Tax. Code § 23301. When a corporation's corporate powers are suspended, its contracts are voidable at the option of the other party to the contract, it cannot sue or defend itself in legal proceedings, it is liable to the State for a $2,000 penalty, and it loses the right to retain its corporate name. See Cal. Rev. & Tax. Code §§ 19135, 23302(a), 23304.1(a); Boyle v. Lakeview Creamery Co., (1937) 9 Cal.2d 16, 18; Boyer v. Jones, (2001) 88 Cal. App.4th 220. California does not provide, however, that the shareholders, officers, or directors of a suspended corporation are individually liable for the corporation's debts.

Therefore, judgment will be entered against Rick Perales alone. Ms. Espinoza will take nothing from Bob Perales.

Nor will judgment be entered against PAC for the simple reason that it was not sued by Ms. Espinoza. PAC is identified only as the fictitious business name of Rick and Bob Perales. Because the parties concede that PAC is a California corporation,

---

[9] Because the evidence offered by Ms. Espinoza regarding PAC's corporate status and the period of any suspension, the court makes no findings regarding a suspension of its corporate powers. It concludes only that a suspension of those powers could have no impact of the liability of Bob Perales.

it can be held liable only if it is named as a defendant. It was not.[10]

A separate judgment will be entered after the court has determined Ms. Espinoza's reasonable attorney's fees.

Dated: 11 January 2006

By the Court

Michael S. McManus, Chief Judge
United States Bankruptcy Court

[10] Assuming for sake of argument that PAC's corporate powers had been suspended, this did not relieve the plaintiff of the requirement that PAC be named as a defendant if she wanted relief against PAC. While a suspension of corporate powers would have precluded PAC from mounting a defense, it was still entitled to be named as a defendant and served with a summons and complaint.

CERTIFICATE OF MAILING

I, Susan C. Cox, in the performance of my duties as a judicial assistant to the Honorable Michael S. McManus, mailed by ordinary mail to each of the parties named below a true copy of the attached document.

Office of the US Trustee
1130 O St. Room 1110
Fresno, CA 93721

Henry Nunez
4478 W Spaatz Ave
Fresno, CA 93722

Peter Bunting
2501 W Shaw Ave #119
Fresno, CA 93711

Martha Espinoza
161 Fett Ave
Parlier, CA 93648

Dated: January 11, 2006

Susan C. Cox
Judicial Assistant to Judge McManus